IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1773

ETHEL BECKFORD, CYNTHIA LAWRENCE, HENRY LAWRENCE, DEVITA BRUTON, WILLY CLYDE STROUD, JOHNNY FLETCHER, GERALDINE FLETCHER, LEE BOHLER, SARA LAWRENCE, LEE ARTHER LAWRENCE, ANNIE MAY LABORN, MADELYN SCHERE, LESLIE ALAN SCHERE, JOHN CUNNING, CAROL CUNNING, THOMAS RUSSELL, LAURIE RUSSELL, DOUGLAS KNOWLES, EDYTH KNOWLES, WAYNE LOUGH and PATRICIA LOUGH,

Petitioners,

versus

DADE COUNTY SCHOOL BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS PURSUANT TO 28 UNITED STATES CODE, SECTION 1254(1)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS PURSUANT TO 28 UNITED STATES CODE, SECTION 1254(1)

The Petitioner, Ethel Beckford, by undersigned counsel, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 26, 1979.

A. OPINIONS BELOW

The opinion of the Court of Appeals is reported at 588 F.2d 501 (5th Cir. 1979). A copy of the decision is appended to this Petition.

The opinion of the United States District Court for the Southern District of Florida is not reported and is contained in the appendix to this Petition.

B. JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 26, 1979. A Petition for Rehearing was denied on March 1, 1979. This Petition was timely filed. The jurisdiction of this Court is based on Title 28 U.S.C. §1254(1).

C. QUESTIONS PRESENTED FOR REVIEW

Point I

Whether the Fifth Circuit Court of Appeals Erred in Affirming the Decision of the District Court Denying the Motion to Intervene . . .

A. Whether a Bi-Racial Group of Parents of Children Attending Either of Two Elementary Schools Affected by Proposed Court Ordered Students Assignment Changes has a Viable and Judicially Cognizable Interest so that a Motion to Intervene should have been Granted . . .

B. Whether the Dade County School Board Failed to Adequately Represent the Legitimate Interests of the Bi-Racial Parental Group by Refusing to Appeal the District Court's Order to Adopt one of Several Plans Submitted by the "Bi-Racial Tri-Ethnic Committee" Where the Applicants were Unduly Prejudiced by the Denial of the Motion to Intervene, and are now Foreclosed from Appealing the Order.

Point II

Whether the Decision below prevents Consideration on the Merits of Fundamental Constitutional Issued Which have not been but Should be Resolved by this Court . . .

A. Whether the District Court Exceeded its Authority When it Ordered the School Board to Adopt One of the Bi-Tri Committee's Proposals Because such Action was not Within the Limited Scope of the Court's Continuing Jurisdiction . . .

B. Whether the District Court's Order Placing the Burden of Proof Upon the School Board, to Disprove a Segregative Intent, was Clearly Erroneous . . .

C. Whether the District Court Erred in Finding a Constitutional Violation and in Taking Remedial Action Where the Local School Board had not Defaulted in its Obligation to Assure a Unitary System of Education.

D. FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

RULE 24. Intervention

A. *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

B. *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

E. STATEMENT OF THE CASE

This Petition seeks review of a United States Fifth Circuit Court of Appeals decision[1] affirming the denial of a motion to intervene. The applicants seeking intervention were a bi-racial group of separate parents of elementary school children, attempting to intervene for the purpose of gaining standing to appeal the United States District Court's Order of June 16, 1978. (17a-22a) That Order required the School Board to set aside its attendance zones for two elementary schools and select from several plans of the Bi-Racial Tri-Ethnic Committee.

This committee was established to review the

1 *Pate v. Dade County School Board*, 588 F.2d 501 (5th Cir. 1979).

operations of the majority to minority transfer rule, the transportation system, the selection of school sites, and other special assignments which the court might direct. Furthermore, the committee was authorized to hold hearings and to make recommendations to the school board. The committee was activated pursuant to the June 26, 1970, District Court Order which, in addition, approved the school board's final desegregation plan. *Pate v. Dade County School Board*, 434 F.2d 1151, 1171 (5th Cir. 1970).

In August, 1970, the school board's desegregation plan, which had been already approved by the District Court, was approved by the Fifth Circuit Court of Appeals. The Fifth Circuit ordered that several modifications to the plan be made. Once the modifications were implemented, the Fifth Circuit determined that the total plan as modified would effectively desegregate the Dade County Schools. *Id.* at 1159.

On June 14, 1971, the District Court entered an order reaffirming its earlier orders (June 26, 1970, and July 24, 1970) which declared the Dade County school systems to be unitary. The Court held that having established a unitary system the only authority remaining vested in the court was the responsibility to assure no reversion to a state-imposed dual system.

The District Court on June 18, 1971, approved the school board's 1971-72 pupil assignment plan and

relieved the school board of any further duty to obtain prior approval of further changes. The Court also stated that the burden as to any further proceedings would be upon the parties or future intervenors to demonstrate a prima facie case of the school board's failure to act according to the principles outlined in the Court's June 14 Order. The Court retained jurisdiction solely for the above-described purpose. *Pate v. Dade County School Board*, 509 F.2d 806, 807 (5 Cir. 1975).

On June 30, 1971, in response to objections to the 1971-72 pupil assignment plan and motions for a new evidentiary hearing, the District Court denied further evidentiary hearings and found that the Dade County school system was a unitary system in compliance with *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). The Fifth Circuit summarily affir..ed the decision. *Pate v. Dade County School Board*, 447 F.2d 150 (5 Cir. 1971), cert. denied 405 U.S. 1064, 92 S.Ct. 1493, 31 L.Ed.2d 794 (1972).

Approximately five years later, in July, 1977, the District Court ordered the school board to file a responsive memorandum, justifying the attendance zones that were listed in the school board's semi-annual report. After reviewing this memorandum, the District Court in an Order dated July 7, 1977, approved the school board's 1977 attendance zone charges.

Other than an Order dropping numerous parties from the case in October, 1977, there were no further

proceedings until May 4, 1978, when the District Court ordered the school board to file a Memorandum in support of its decision not to put into effect certain recommendations of the Bi-Tri Committee. Although there is no letter in the record, nor any pleading filed, the District Court indicated that the Order was in response to a request by the Bi-Tri Committee for the court to take positive action to implement the attendance zone changes which the committee recommended, specifically for Richmond Elementary and Pine Lake Elementary Schools.

After the school board filed its Memorandum opposing the changes, an evidentiary hearing was held. On June 16, 1978, the District Court issued an Order stating that the school board acted with discriminatory intent when it established attendance zones for the Pine Lake Elementary School. The court ordered the Board to accept one of the proposed plans that the Bi-Tri Committee had recommended, and stated that if the Board could not make a decision within 10 days then that decision would be made by the court.

On June 23, 1978, Ethel Beckford and a group of black and white parents from both the Richmond and Pine Lake Elementary zones filed their Motion to Intervene for the purpose of appealing the June 16 Order together with a Motion for Emergency Hearing and Motion to Stay. On June 30 the school board filed its response to the June 16 Order, indicating acquiescence and opposing the pending Motion to Intervene. The

motion was also opposed by the ACLU which has since withdrawn from the case. Intervenors replied to these responses.

On July 13, 1978, intervenors Beckford, et. al. filed a Notice of Appeal from the June 16 Order.

On August 2, 1978, the District Court, without a hearing, entered an Order and Memorandum Opinion denying the Motion to Intervene, to Stay and for Emergency Hearing. Immediately thereafter, Petitioners appealed the denial of the Motion to Intervene to the Fifth Circuit Court of Appeals. The appeals were consolidated in the Fifth Circuit which affirmed the decision of the District Court denying the Motion to Intervene and as a result dismissed the appeal on the merits for lack of standing. Specifically, the Fifth Circuit held that parents of elementary school children have no right to intervene, nor should permissive intervention be granted, in order to oppose a "desegregation" order.

F. STATEMENT OF THE FACTS

In 1969, an action was brought against the Dade County School Board by a group of citizens who sought to enjoin the school board from implementing the desegregation plan it had approved for the 1969-70 school year. In 1970, the District Court denied the Plaintiffs' relief and approved the school board's desegregation plan. The Fifth Circuit Court of Appeals

approveu the District Court's decision and ordered that some modifications of the plan be made. Both the District Court and the Fifth Circuit indicated that once the plan with the modifications was implemented, the Dade County schools would be desegregated and would be considered a unitary system of education.

Prior to the institution of the action there were four elementary schools between Coral Reef Drive and Eureka Drive and west of U.S. Highway #1. These were Colonial Drive, Richmond, Miami Heights and Moton Elementary Schools (See Figure #1, 8a). The school board desegregation plan which was approved by the District Court and the Fifth Circuit changed the boundaries of these elementary schools.

The boundary change resulted in the transfer of Colonial Drive pupils to Richmond. The result was a black-white ratio of 77.4 to 22.6% at Richmond Elementary. Colonial Drive, whose boundaries were established contiguous to Richmond, had a white-black ratio of 67% to 33% (See Figure #2, 8a).

During the years 1970-1976, Richmond, with the court's approval, had contiguous boundaries with predominantly white Colonial Drive and Miami Heights. Neither the Bi-Tri Committee nor the District Court, nor anyone else objected to the maintenance of these boundaries throughout the six year period. During the same period, the District Court declared on two occasions that Dade County was operating a unitary

system of education in conformity with constitutional guidelines. Both of these decisions were affirmed by the Fifth Circuit Court of Appeals.

Severe overcrowding at Colonial Drive and Miami Heights caused the school board to build Pine Lake Elementary to alleviate the problem. When Pine Lake was built in 1976, boundaries were drawn so that Pine Lake had the same boundaries contiguous to Richmond as those which were previously maintained by Colonial Drive and Miami Heights (Figure #3, 8a). The Bi-Tri Committee made no objection to the boundaries when they were established.

In the summer of 1977, the Bi-Tri Committee suggested that the school board change the Pine Lake attendance boundaries. The school board decided not to do so.

In 1978, the Bi-Tri Committee submitted a report to the school board and to the District Court in which it recommended that the Pine Lake/Richmond boundaries should be changed for the 1978-1979 school year. In March of 1978, the school board, after consideration of the committee's report and after a public hearing decided to maintain the Pine Lake/Richmond boundaries as they had previously been established. The boundaries which were maintained left Pine Lake and Richmond with the same contiguous boundaries as had previously been maintained by Colonial Drive and Richmond. The boundary which was maintained was

the same boundary which was a part of the previously approved Dade County desegregation plan.

After the Board decided not to implement the committee's recommendations, the committee submitted a report to the District Court in which it urged the Court to take positive action with respect to the school board's decision. Although the committee, having been established by the Court, was not an official party to the action; and although no pleading was filed seeking relief, the District Court entered an Order to Show Cause. The Court ordered the school board to submit a memorandum in support of its decision not to implement the recommendations of the Bi-Tri Committee.

The school board filed a memorandum stating that its reasons for not changing the Pine Lake/Richmond boundaries were:

a) The boundaries were the same ones which were set by the court itself in 1969-1970, and the racial composition of the schools had remained approximately the same since that time.

b) The racial ratio at Richmond Elementary is 78% black-22% white; a desegregated school according to the court's criteria.

c) Pine Lake was built to relieve overcrowding at Colonial Drive and Miami

Heights Elementary Schools. There was no similar overcrowding at Richmond Elementary. Accordingly, boundaries for Pine Lake had been drawn to take students from Miami Heights and Colonial Drive, which happened to be majority white students.

d) The movement of children from Richmond would cause a change in the concentration of Title I eligible children and would place Richmond on a lower priority insofar as continued receipt of Title I funds, and would probably result in the loss of those funds. [This prediction has now come true].

The District Court held an evidentiary hearing on the matter at which time the only party to participate was the School Board. Dr. Gordon Foster, Chairman of the Bi-Tri Committee testified in opposition to the school board. On June 16, 1978, the court issued an order stating that the School Board had acted with segregative intent in maintaining the Pine Lake/Richmond boundaries. The Court ordered the School Board to accept one of the Bi-Tri Committee's proposals for boundary changes (6a).

The School Board decided not to appeal the court's decision. Petitioners, a bi-racial group of parents representing students of both Pine Lake and Richmond Elementaries, filed motions with the District Court requesting leave to intervene for the purpose of appeal-

ing the Court's June 16, 1978, Order and requesting a hearing on the Motion to Intervene.

The intervenors alleged that their interests and those of their children were not being adequately represented in the decision not to appeal. They further alleged that it was not their intention to substitute their judgment for that of the school board but to free the board from judicial restraint so that it might exercise its discretion to the fullest degree constitutionally permissible in deciding educational policies.

After denial of all intervenors' motions without hearing, the consolidated appeals and this petition followed.

G. ARGUMENT

THE DECISION BELOW CONFLICTS WITH THE DECISION OF OTHER COURTS OF APPEALS AND THE SUPREME COURT.

Point I

The Fifth Circuit Court of Appeals Erred in Affirming the Decision of the District Court Denying the Motion to Intervene . . .

The Fifth Circuit specifically declined to follow, and the decision below therefore squarely conflicts with the landmark decision of *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). Although the Fifth Circuit *might* not

follow the principals of law set forth in *Smuck*[2], those same precepts are widely accepted and followed by other Courts.[3]

The Smuck court rendered an interpretation of Rule 24(a)(2), Federal Rules of Civil Procedure soon after this Rule was amended in 1966. The Rule, of course, deals with intervention as a matter of right. It was to be determined:

> 1) Whether the applicants for intervention, parents of school children, had a sufficient interest in the education of their children such that they should be allowed to take part in litigation which would directly affect their children;

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2 *See Pate v. Dade County School Board*, 588 F.2d 501, 504 (5th Cir. 1979) where the Court acknowledged the existence and credibility of the *Smuck* rationale, but nevertheless, refused to adopt it as the law of the Fifth Circuit. *See Also, United States v. Perry County Board of Education*, 567 F.2d 277 (5th Cir. 1978).

3 *Smuck* has been recognized and followed by District Courts in the Third Circuit. *Holmes v. Government of the Virgin Islands*, 61 F.R.D. 3, 4 (D.C.V.I. 1973); *Pierson v. United States*, 71 F.R.D. 75, 78 (D.C.Del. 1976). *Smuck* has also been accepted and/or cited with approval by the Fourth, Seventh, Eighth, Ninth and D.C. Circuit Courts of Appeals. *Atkins v. State Board of Education*, 418 F.2d 874 (4th Cir. 1969); *Neugebauer v. A. S. Abell Co.*, 77 F.R.D. 712 (D.C.Md. 1978); *Romasanta v. United Airlines*, 537 F.2d 915 (7th Cir. 1976); *United States v. Board of School Commissioners*, 466 F.2d 573 (7th Cir. 1972); *Armstrong v. O'Connel*, 75 F.R.D. 452 (E.D.Wis. 1977); *Liddell v. Caldwell*, 546 F.2d 768 (8th Cir. 1976); *Johnson v. San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974); *Adams v. Mathews*, 536 F.2d 417 (D.C.Cir. 1976). The U.S. Supreme Court cited *Smuck* with approval in *United Airlines v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977).

> 2) Whether these applicants for intervention are so situated that the disposition of the action at bar may as a practical matter impair or impede their ability to protect their interest;
>
> 3) Whether the parents were adequately represented by the school board's decision not to appeal a court order which order was to force the school board to implement a judicially proposed plan for school desegregation.

The *Smuck* decision resolved the issues presented by granting to the parents the right to intervene. The precept therefore arose that a group of parents, as a matter of right, are entitled to intervene in continuing litigation regarding school desegregation matters, initially because they unquestionably, have a sufficient and legally cognizable "interest" in the education of their children.

Secondly, the Court in *Smuck* recognized that the parents seeking intervention were so closely concerned and connected with the action at bar that to dispose of the case without allowing parental intervention would as a practical matter, impair or impede their ability to safeguard their interest. The Court stated:

> If the right to intervene is denied and the decision below becomes final, there is no apparent way for the parents to pursue their interests

> in a subsequent lawsuit. True, they could assert that the new policies adopted by the Board of Education in compliance with the order below are unconstitutional. But this would be a sterner challenge than they would face as intervenors here: although the new policies might not be constitutionally required, they might also not be unconstitutional. *Smuck, supra* at 180-181.

In short, it was *unnecessary* for the parents to demonstrate that denial of intervention would cause them irreparable harm. Rather, the intervenors were successful in bearing their burden to show that their interests would "as a practical matter" be affected by a final disposition of this case without appeal. *Id.* at 181.

The remaining requirement for intervention is that the applicant not be adequately represented by others. The court held the parents were not adequately represented by the school board's decision not to appeal. The court stated:

> . . . the interests of the parents who wish to intervene in order to appeal do *not* coincide with those of the Board of Education. The school board represents all parents within the District. The intervening appellants may have more parochial interests centering upon the education of their own children. While they cannot of course ask the Board to favor their

> children unconstitutionally at the expense of others, *they like other parents can seek the adoption of policies beneficial to their own children.* (Emphasis added). *Smuck, supra* at 181.

In determining whether the school board adequately represented the legitimate interests of the parents seeking intervention, the school board is presumed to be acting in its representative capacity in good faith. However, the presumed good faith of the school board, in deciding to refrain from appealing the court order to comply with the proposed desegregation plan, is not conclusive. *Id.* at 181. The parents are not forced to demonstrate the board's bad faith in deciding not to appeal, as a condition precedent to intervention. Nor are the parents compelled to accuse the board of a lack of vigor in defending the suit below before an order granting intervention will issue. In *Smuck*, the parents were successful in securing the right to intervene because they effectively illustrated to the court that their interest in the litigation was to free the school board from the unwarranted judicial restraints imposed by the preceding court order. As in the case at bar, the parents' objective was to restore to the school board "the broadest discretion constitutionally permissible in deciding upon educational policies." This objective was to be implemented through the procedural tool of intervention; to intervene as a matter of right, for the purpose of appealing an unfounded and antipragmatic court order to desegregate and to demonstrate that acquiescence to the plan was attributable to judicial coercion and interference. In short, the parents perceived their school board as intimidated and unwilling to override court order such that parental involvement was necessitated.

By granting the parent/applicants the right to intervene, the *Smuck* court then had jurisdiction to and did reach the merits of the appeal pursued by the parents. At bar, the problems which were anticipated or found to be existent in *Smuck* are a reality. They are magnified by the fact that the District Court's order affected only the two schools where the intervenors children attended. The *Smuck* court observed exactly what would have been shown here had a requested evidentiary hearing been permitted — that other considerations may have led to the school board's determination not to appeal.

> And the Board of Education, buffeted as it like other school boards is by conflicting public demands, may possibly have less interest in preserving its own untrammeled discretion than do the parents. It is not necessary to accuse the board of bad faith in deciding not to appeal or of lack of vigor in defending the suit below in order to recognize that a restrictive court order may be a not wholly unwelcome haven. *Smuck* at 181.

The school board has never admitted that it was wrong in rejecting the Bi-Tri Committee's recom-

mendations. It specifically refused to defend the merits of the District Court's decision before the Fifth Circuit. The only other party opposing intervention, the ACLU, subsequently withdrew from the case and never filed a brief. Other parties before the District Court have not been heard from since the mid-1970's. In short, it appears that intervenors children have been sacrificed for peace and tranquility between the school board and the District Court, who are the only active entities in the case.

The Fourth Circuit Court of Appeals was confronted with a case strikingly similar to both *Smuck* and the case at bar. *Atkins v. State Board of Education*, 418 F.2d 874 (4th Cir. 1969). In *Atkins*, the court held that children's parents should be permitted to intervene in a school desegregation case. The Court asserted:

> [This] court has long recognized the intense interest of parents in the education of their children, and it has been solicitous of their opportunity to be heard. *Intervention in suits concerning public schools has been freely allowed, and we see no reason why it should be denied here*, especially in view of the lack of prejudice to other parties. (Emphasis added). *Atkins, supra* at 876.

With respect to the applicable law of the Fifth Circuit, regarding parental rights of intervention in school desegregation matters, the cases directly on point are split. The case at bar plus *United States v. Perry County*

Board of Education, 567 F.2d 277 (5th Cir. 1978) stand for the proposition that parental intervention in school desegregation matters should be denied as a matter of right. *Hines v. Rapides Parish School Board*, 479 F.2d 762 (5th Cir. 1973) merely indicates that it is improper for disgruntled parents to attack deficiencies in the implementation of desegregation orders by means of a class action suit. The *Hines* court directed the parents, seeking to question the efficacy of the implementation of the desegregation order, to instead petition the District Court to allow them to intervene. As a matter of fact, the *Hines* court left open the possibility that intervention as a matter of right may be appropriate for a parent group where the group has a "significant claim which it can best represent." *Id.* at 763. The Court predicted that in most school integration cases intervention would most likely consist of the opportunity to present claims to the court and to any group, such as a bi-racial committee, working under the court's supervision to achieve a unitary system and to have the allegations considered on the merits. Furthermore, the *Hines* court suggested intervention may be granted unless the following is deemed adequate:

> Where a committee is involved, the court might feel it desirable to allow the applicants representation on that body. This procedure would seem sufficient to ensure that different points of view would be presented in the difficult and often emotional struggle to achieve

> the constitutionally mandated but highly elusive unitary school system.[4] *Id.* at 765.

It is imperative to point out that in the case at bar, none of the parents seeking intervention were asked to join or speak to the Bi-Racial Tri-Ethnic Committee to thereby ensure that different points of view would be represented. Nor did it hold any public hearings.

Two other cases handed down by the Fifth Circuit have as an outcome, the denial of intervention to parents in school desegregation matters. *Darville v. Dade City School Board,* 497 F.2d 1002 (5th Cir. 1974); *Jones v. Caddo Parish School Board,* 499 F.2d 914 (5th Cir. 1974).

The Sixth Circuit forbids parents of children in the county's public schools from intervening as a matter of right where it is affirmatively shown that their position is adequately represented by the school board. *Hatton v. County Board of Education,* 422 F.2d 457 (6th Cir. 1970).

The case law adjudicated by the Seventh Circuit reveals the acceptance of the *Smuck* legal principles as previously set forth. In *United States v. Board of School Commissioners,* 466 F.2d 573 (7th Cir. 1972), the Seventh Circuit determined that Citizens of Indianapolis for Quality Schools (CIQS) were entitled to intervene in an ongoing school desegregation lawsuit since members of CIQS had children enrolled in the public school

4 The Dade County school system has been declared unitary by the Fifth Circuit on two previous occasions.

system. In addition, intervention was granted to a group of stewardesses in a civil rights action against an employer-airlines alleging sex discrimination in the creation and enforcement of a "no-marriage" rule applicable to female flight attendants but not male. See *Romasanta v. United Airlines,* 537 F.2d 915 (7th Cir. 1976). The grant of intervention was upheld by this Court relying on *Smuck.* See *United Airlines v. McDonald,* 432 U.S. 385 (1977). Furthermore, in that case this Court went on to evaluate the merits since standing had been conferred. Petitioner urges this Court to follow the same course here.

The Eighth Circuit has allowed six black people, through their parents and friends, to intervene in a school desegregation matter. *Liddell v. Caldwell,* 546 F.2d 768 (8th Cir. 1976). The Eighth Circuit determined that the applicants for intervention were not adequately represented by the school board since the representative school board failed in the fulfillment of its duty. In *Liddell,* the applicants for intervention did not attempt to assert a right to relitigate or undo the factual stipulations of the parties. Rather, the applicants' primary purpose in seeking intervention related to their objections to the proposed remedy, that is, to the ultimate plan of desegregation. *Id.* at 771. Similarly, this was the case with the Petitioners herein on seeking intervention to oppose the continued shuffling of their children to and from schools which are already desegregated in a system which is already unitary.

Spangler v. Pasadena City Board of Education, 427 F.2d 1352 (9th Cir. 1970) was misconstrued by the Fifth Circuit in this case below. See *Pate v. Dade County School Board*, 588 F.2d 501, 504 (5th Cir. 1979). The Fifth Circuit asserted that the *Spangler* court rejected application of the *Smuck* decision by holding that the applicants were not entitled to intervene for the purpose of appealing an order which the board of education had decided not to appeal. More precisely, the Ninth Circuit in *Spangler* never foreclosed intervention as a matter of right, as a procedural safeguard available to parents where they are interested in involving themselves in a school desegregation lawsuit. The Ninth Circuit acknowledges that issues may arise during the course of the main desegregation proceeding that would necessitate parental intervention. *Spangler v. Pasadena Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977). In other words, in *Spangler*, the court followed the rationale of *Smuck*, but reached a different conclusion.

> In other actions involving school desegregation, however, we have allowed intervention by parents as a matter of right where the issues that emerge during the litigation are such that intervention is warranted. *Spangler, supra* at 1329.

The Ninth Circuit also decided *Johnson v. San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974) where the court initially allowed a group of racially mixed parents the right to intervene in a school desegregation

lawsuit, and then subsequently granted intervention as a matter of right to a separate group of Chinese parents whose interest was found to be inadequately represented by both the school board and the initial, bi-racial intervening parents. The Chinese parents of elementary school children opposed the compulsory reassignment of such students outside the area in which they reside. The *Johnson* court favorably relied upon *Smuck*, not only applying its rationale but coming to the same conclusion — parental intervention should be granted as a matter of right. *Johnson, supra* at 352-353.

Smuck has remained good law in its "birthplace" jurisdiction. See *Adams v. Mathews*, 536 F.2d 417 (D.C.Cir. 1976). *Smuck* provided the authority upon which to allow a women's group intervention as a matter of right where no party in the racial discrimination suit represented the women's interest. *Id.* at 418.

The foregoing survey of the existing case law of the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits, reveals a serious split within and amongst the various Circuit Courts of Appeal. There is no existing case law on this matter out of either the First or Tenth Circuits. Within the Third Circuit, *Smuck* has been cited favorably in two federal district court cases. See *Holmes v. Government of the Virgin Islands*, 61 F.R.D. 3, 4 (D.C.V.I. 1973); *Pierson v. United States*, 71 F.R.D. 75, 78 (D.C.Del. 1976). The Second Circuit has followed *Smuck*, on different facts, in deter-

mining whether or not applicants for intervention have a significant protectable interest in the litigation. *Rios v. Enterprise Association Steamfitters Local Union*, 520 F.2d 352, 357 (2nd Cir. 1975).

Not only would the Fifth Circuit not follow *Smuck* in allowing intervention as of right, it broke new ground in determining that permissive intervention would not be allowed either, holding:

> The parental interest that justifies permissive intervention is an interest in a desegregated school system. Here . . . the parents are not seeking to challenge deficiencies in the implementation of desegregation orders . . . *Pate v. Dade County School Board*, 588 F.2d 501, 503 (5th Cir. 1979).

Where the Fifth Circuit has missed the mark is in its failure to recognize that this case does not fit the standard desegregation case mold. The intervening parents are asked to demonstrate an interest in a desegregated school system when their system has already been declared unitary. They are condemned for opposing a "desegregation" order when the schools their children attend are already desegregated at the exact racial mix and boundaries prescribed by the Fifth Circuit in 1970.

There can be no standard for permissive intervention which determines in advance the merits of the argument to be presented. To do so subverts due

process since applicants in intervention may never get appellate review. To allow parents of children in the same school to intervene if they take Position A but not if they take Position B is patently erroneous.

There exists a clear and long standing conflict among the Circuit Courts of Appeal on the right of parental intervention. For the foregoing reasons the Petition should be granted.

Point II

The Decision Below Prevents Consideration On The Merits Of Fundamental Constitutional Issues Which Have Not Been But Should Be Resolved By This Court.

A. The District Court Exceeded Its Authority When It Ordered The School Board To Adopt One Of The Bi-Tri Committee's Proposals Because Such Action Was Not Within The Limited Scope Of The Court's Continuing Jurisdiction.

The District Court retained jurisdiction over this ongoing desegregation action for the limited purpose of insuring that the Dade County school system did not revert to a dual system of education. The Court exceeded its authority when it took action which was outside the limited scope of its retained jurisdiction.

In June, 1971, one year after the decision of the Fifth Circuit affirming the District Court's approval of the

School Board's desegregation plan, the District Court outlined the continuing duty of the School Board to make the desegregation plan work, recognizing the Court's responsibility to assure that the school system remained unitary. The Court stated:

> Once having disestablished the dual school system and eliminated racial discrimination through official action from the system, there remains vested in the authority of this Court only the responsibility to assure that the school system does not revert to a state-imposed dual school system.

The logical extension of this limitation is that absent at least an allegation of such a reversion by a party to the action the Court was without authority to exercise such jurisdiction.

In the case at bar, no such allegation has ever been made. The only allegation made was that the School Board, in deciding not to accept the Bi-Tri Committee's proposed changes for the Pine Lake/Richmond boundaries, somehow failed to racially balance the schools.[5] This allegation purported to support the conclusion that the School Board's inaction was a failure of their duty to ensure a unitary system.

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5 It should be noted that this allegation was made by the Bi-Tri Committee, a Court appointed committee, that was not a party to the action. The Court's order was in direct response to this allegation which was made in a committee-written report.

An allegation that the School Board's inaction would lead to a reversion to the dual system could never have been made. All the School Board's decision did was to maintain boundaries which were part of a prior Court ordered desegregation plan. The boundaries being maintained were part of a school system which had on two previous occasions been declared unitary by the same Court which now claims that the School Board acted with segregative intent in deciding to maintain these Court approved boundaries.

In *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976) the Supreme Court was faced with the issue of the scope of a Court's authority in desegregation matters particularly with respect to the retention of jurisdiction after the initial controversy is resolved. The Court found that when a racially neutral attendance pattern is established, in order to remedy perceived constitutional violations, the courts have fully performed their function in providing appropriate remedy for previous racially discriminatory attendance patterns. The Court further stated that once a unitary system was established the District Court's jurisdiction would be limited to insuring that the unitary system was maintained.

Both the Ninth Circuit and Supreme Court ridiculed the lifetime jurisdiction asserted by the District Court. Even the dissenters on the Supreme Court disagreed with any such concept, particularly to the extent that it might suggest that continuous zoning changes could be

required "even after the Court has determined that its plan has been effectively implemented and racial discrimination [has been] eliminated from the system." 427 U.S. at 443, 96 S.Ct. at 2708.

In *Spangler* this Court also dealt with the issue of mootness in a case which began as an individual private action seeking to have schools desegregated. The Court found that the case was not moot, *only because the United States had intervened and was authorized to continue as a party Plaintiff.* The Court stated that absent the United States' intervention the case would have been moot due to "the disappearance of the original Plaintiffs and the absence of any class certification". 96 S.Ct. at 2702. Here, the District Court has clearly resurrected a moot case for the purpose of asserting continuing jurisdiction. The case should be remanded to the District Court for dismissal.

B. *The District Court's Order Placing The Burden Of Proof Upon The School Board, To Disprove A Segregative Intent, Was Clearly Erroneous.*

The District Court, in its Order to Show Cause dated May 4, 1978, ordered the School Board to show cause why its inaction did not constitute segregative intent. This Order, and the hearing held pursuant thereto, erroneously thrust the burden of proof upon the Board of *disproving* segregative intent. At that hearing, no party other than the board presented any evidence. The

Court held on June 16, 1978, that the Board had failed to meet the burden of proof placed on it, and held further that a segregative intent existed within the definition set out by the Fifth Circuit in *United States v. Texas Education,* 564 F.2d 162 (5 Cir. 1977), (hereinafter *Austin III*). This Order was entered despite the fact that no evidence was offered to show that there had been any segregative intent in the Board's decision to maintain the Pine Lake/Richmond boundaries.

Absent a showing that the School Board has deliberately attempted to fix or alter school boundaries to affect the racial composition of the schools, the District Court should refrain from interfering with the School Board's discretionary powers. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 32, 91 S.Ct. 1267, 1284, 28 L.Ed.2d 554 (1971). At bar, the School Board demonstrated that its actions in setting boundaries for Pine Lake had no effect on previously approved boundaries and did not adversely affect racial composition of the schools.[6]

In the *Swann* case, the District Court held lengthy evidentiary hearings, received voluminous evidence, and based its holdings upon the massive record it had collected. In reviewing the lower Court's decision, the Supreme Court held that the burden of proof is only

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6 Since the racial composition of Richmond is identical to that previously approved by the District Court and Fifth Circuit, it is not segregated. Pine Lake, at 79% white-21% black, reflects the racial composition of the schools whose overcrowding it was built to relieve, which racial composition was similarly approved.

upon the School Board when the system is being converted from a dual to a unitary system. *Swann*, 402 U.S. at 26, 91 S.Ct. at 1281. The rationale for this is clear; once a Plaintiff has previously met his burden of proof and demonstrated that a Board's actions are discriminatory, it is incumbent upon that Board to prove its remedial actions are nondiscriminatory. In the case at bar, this initial burden has never been met; the District Court *initially* ruled that the School Board had to disprove any segregative intent.

This initial ruling was in direct contrast to the court's own order dated June 18, 1971, and quoted with approval by the Fifth Circuit in *Pate v. Dade County School Board*, 509 F.2d 806 (1975), wherein the Court stated:

> The burden shall be upon the present intervenors or any other persons hereinafter permitted to intervene to demonstrate to this Court a prima facie case of the School Board's failure to act in accordance with the principles outlined in this Court's order of June 14, 1971.

In choosing to ignore this previous order, the District Court relied on the Fifth Circuit's holding in *Austin III*, 564 F.2d 162 (5 Cir. 1977) on the issue of segregative intent. In that case the court adopted the tort law rule that one intends the natural and foreseeable consequences of his actions. Although the Fifth Circuit did not clarify the specific burden the plaintiff must meet,

it did make it clear that before this tort theory could be applied, the plaintiff had to present a prima facie case of impermissable ethnic discrimination. *Austin III*, 564 F.2d at 168.

In the case at bar, the "plaintiffs" never established the prima facie case required by *Austin III*. The District Court in its June 16 Order refers summarily to the evidentiary hearing and merely states that it applied the *Austin III* standards. The Court made no findings of fact upon which it relied, nor did it specify how the standards were applied. The Court concluded, "that discriminatory intent may be inferred from a School Board's refusal to take action to *ameliorate segregation.*" The District Court then proceeded to apply the standards applicable to a *dual* system.

It is this misapplication of these principles to a unitary system which is clearly erroneous. The *Austin III* court held that intent could be implied only after the Board failed to correct an already proven illegal course of action. Before any implication can be made, a plaintiff must first prove that segregation within the system exists. The District Court ignored this first essential step and applied the law from cases which dealt with the conversion over from a dual to a unitary system.

The only conclusion which may properly be made from the School Board's refusal to adopt the committee's recommendations is that the original scheme

of integration approved by the Fifth Circuit has been preserved. It is one thing to imply continued segregative intent to a board which has fostered a discriminatory system; but that intent cannot be implied to a board which has for eight years maintained a lawful unitary system.

C. *The District Court Erred In Finding A Constitutional Violation And In Taking Remedial Action Where The Local School Board Had Not Defaulted In Its Obligation To Assure A Unitary System Of Education.*

Assuming arguendo that the court had jurisdiction, it exceeded its authority when it ordered the School Board to adopt one of the Bi-Tri Committee's recommendations for attendance boundary changes. The court issued the order to a School Board that had not committed a constitutional violation and had been operating a unitary system of education for eight years.

In discussing the authority of the courts with respect to desegregation matters, the United States Supreme Court stated:

> . . . judicial powers may be exercised on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of the school authorities whose powers are plenary. Judicial authority

> enters only when local authority defaults. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, (1971).

The Dade County School Board is under a continuing duty to appraise the system in light of "actual conditions and experience" and to make changes within the limits set by the court to assure the maintenance of a unitary school system. *Pate v. Dade County School Board*, 434 F.2d 1151 (5 Cir. 1970). Petitioners maintain that the unitary system was not and is not threatened. The Dade County School Board has not defaulted in its obligation to maintain such a system and therefore the court erred in substituting its judgment for that of the board.

The "actual conditions and experience" in the area do not require a change. The racial make-up of the area has not changed. Only the number of people has changed, requiring the construction of an additional school in the majority white area. A case for the District Court could be made if the School Board had used this opportunity to change the boundary between the majority white and majority black zones. A case could be made if the board had gerry-mandered the majority white attendance zone to create a "lily-white" school at Pine Lake. But this was not the case. The attendance zone established for Pine Lake was consistent with a good faith effort to maintain the present level of desegregation in the area based on the existing boundaries. Pine Lake is an integrated school.

In *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), the Supreme Court stated ". . . that existing policy with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system." 88 S.Ct. at 1692. These criteria were satisfied in Dade County in 1970. *Pate v. Dade County School Board*, 434 F.2d 1151 (5 Cir. 1970). No allegations were made, even by the Bi-Tri Committee, that the School Board had failed in these areas in the Richmond/Pine Lake boundary question.

Thus the issue is exposed for what it is — the desire of the District Court and the Bi-Tri Committee to increase the racial mix beyond that already existing in this unitary school system. While this goal may be commendable it is not constitutionally required. Nor is the District Court permitted to substitute its discretion for that of the elected School Board in the absence of a showing of constitutional violation. *Swann*, 91 S.Ct. at 1282; *Dayton Board of Education v. Brinkman*, 97 S.Ct. 2766 (1977).

> The finding that the pupil population . . . is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board. *Dayton*, 97 S.Ct. at 2772 citing *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976).

It can therefore be seen that the District Court unconstitutionally infringed on the School Board's discretion in deciding educational policy and will continue to do so in the future. Unfortunately, the School Board does not find this continuing spectre as uncomfortable as do the parents of the children involved, who elected the School Board to determine such policy. Without any other active party in the case, the situation will continue for the lifetime of the District Court.

CONCLUSION

The Court is faced with a case where School Board has, to the detriment of the children involved, failed to appeal a clearly erroneous decision of the District Court. The District Court and the Court of Appeals have refused to allow the parents of these children to intervene to establish that the School Board's position was correct and to assert that a District Court in a unitary system is not permitted to substitute its judgment for that of the elected board. Based upon the facts and law the Petition for Writ of Certiorari should be granted.

Respectfully submitted this ____ day of May, 1979.

NORMAN S. SEGALL, ESQ.
100 North Biscayne Boulevard
Suite 607
Miami, Florida 33132
Telephone: (305) 373-3019

CERTIFICATE OF SERVICE

I CERTIFY that three copies of foregoing were furnished by mail this ____ day of May, 1979, to: Frank A. Howard, Jr., Esq., Attorney for School Board, Suite 200, 1410 N.E. 2 Avenue, Miami, Florida.

NORMAN S. SEGALL
Attorney for Petitioner
100 North Biscayne Boulevard
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Miami, Florida 33132

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

HERBERT PATE, et al
Plaintiffs,

v. No. 69-1020-Civ-CA

DADE COUNTY SCHOOL BOARD, et al
Defendants

ORDER

(Filed: June 16, 1978)

In *Pate v. Dade County School Board,* 434 F.2d 1151 (5th Cir. 1970), the Fifth Circuit ordered this Court to monitor the actions of the Dade County School Board ("Board") so as to insure that the Board carries out its continuing duty to act in a manner consistent with a unitary system of education. Pursuant to that mandate, the Court established the Bi-Racial, Tri-Ethnic Committee ("Committee") to oversee the actions of the Board and report to the Court any conduct by the Board which might be inconsistent with the guidelines set out by the Fifth Circuit.

Prior to the Board's final decision as to the 1978-79 attendance zone changes, the Committee recommended a plan containing three exceptions to the Board's proposed changes which, in the Committee's opinion, conformed with the teachings of the United States

Supreme Court and the Fifth Circuit Court of Appeals. The Board accepted one recommendation, that relating to Leewood Relief Elementary School, and rejected those relating to Miami-Sunset Senior High and Pine Lake-Richmond Elementary Schools.

On April 19, 1978, the Committee filed a report in which it urged this Court to take positive action in preventing what it believes is a violation of the law by the Board in setting attendance zones for the 1978-79 school year.

On May 15, 1978, the Court received the Board's memorandum in opposition to the Committee's Report. The Court has received several memoranda, reports and letters from concerned citizens and committees, and considered them along with all the other relevant evidence offered in these proceedings.

As the Court noted, in a prior Order, the Court will examine this dispute under the two-pronged analysis set forth in *Dayton Board of Education*, namely:

> "The duty of the district court is first to determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils. If such violations are found, the District Court must determine how much segregative effect these violations made [and design a remedy to cure such effect]."

The Court notes that these proceedings do not challenge the Board's conduct with respect to the entire Dade County School System, but rather, they involve a challenge to the Board's conduct as to two newly constructed schools. As such, such challenge is an attempt to excise any incipient, unlawful developments that may infect the entire system.

Thus, the Court heard evidence from the Board and the Committee on whether the Board had the requisite discriminatory intent in adopting the subject attendance zones. The Court also heard evidence on the various proposals offered.

As to the issue of intent, the Court draws upon the Fifth Circuit's opinion in *Austin, III*, 564 F.2d 162 (5th Cir. 1977) as supplying the controlling law. There, the Fifth Circuit adopted an objective test for ascertaining discriminatory intent and incorporated in school segregation law the ordinary rule of tort law that a person is presumed to intend the natural and foreseeable consequences of his actions. *Id.* at 167. The Fifth Circuit also laid down several factors which the District Court should consider in ascertaining intent. As stated by the Appellate Court:

> "The presumption is especially probative in assessing the official intent behind such affirmative school board decisions as those concerning school locations, the construction and renovation of school, the closing of schools,

the drawing of school attendance zones, and the assignment of faculty and staff."

Id. at 169.

The appellate court also suggested that discriminatory intent may be inferred from a school board's refusal to take action to ameliorate segregation. *Id.* at note 10. The appellate court further noted that statistics, the history of both the schools in question and the Board's prior conduct are also relevant to the determination of intent. *Id.* at 170-71.

Upon examining the evidence in these proceedings and applying the same to the aforementioned standards, the Court finds that the School Board had the requisite discriminatory intent in setting the attendance zones both for Pine Lakes/Richmond Elementary Schools and for Miami Sunset High School.

A. As to the Pine Lake/Richmond Elementary Schools, the Court notes with regret that the Board has failed to seize an excellent opportunity to ameliorate the segregative conditions in that area. The schools are virtually next to each other, yet when the Pine Lakes Elementary School was opened one year ago, the Board did nothing to improve the educational milieu to which the black students in the Richmond Heights area are subjected. The Court refused to take any action last year upon the Board's representation that it would impose an inequitable burden on its system of adjusting

attendance zones because of the purportedly untimely request by the Committee in seeking judicial relief. This year, however, no such excuse exists, and the only meritorious justification the Board has proposed is that Title I funds may be withheld from Richmond Heights students, a justification which carries little weight in ensuring that the state's constitutional mandates are carried out. The fact that Pine Lakes was built with so-called "open classrooms" has no material bearing on the issues in this proceeding.

Mr. Eldridge Williams, furthermore, was unable to explain the benefits of maintaining the present attendance zone, nor was he able to suggest any burdens that would encumber the educational system if the zones were re-drawn to ameliorate the segregative effects that now exist in the area.

Pine Lakes Elementary School is a newly constructed school. Being in close proximity with Richmond Heights, its location would permit the drawing of attendance zones that would allow black Richmond Heights students to attend Pine Lakes, and white Pine Lakes students to attend Richmond Heights, without such disruptive effects as busing. There is no excuse for the Board's failure to act in this situation. The Court, therefore, must now exercise the constitutional authority it has withheld for the past eight years. Since the Board is presumed to intend the natural and foreseeable consequences of its actions, the Court finds that the Board has acted with discriminatory intent,

and thus violated its constitutional duty, in maintaining an 80% white-20% black ratio at Pine Lakes, and an 80% black-20% white ratio at Richmond Heights.

As to the remedy for such violations, the Court will allow the Board to select from the several plans proposed or adopted by the Committee. In this regard, the Board and Committee should meet to amicably arrive at a plan. If none is reached by June 26, 1978, the Court will decide on such a plan.

B. *Miami Sunset High School*

Although the Court gives considerable credibility to the Board's witnesses as to the reasons for the building of Miami Sunset High School (which is equidistant between, and will thus relieve the overcrowding in, Killian and Southwest High Schools), the fact that the attendance zones were so drawn as to restrict the black enrollments there to 1 percent, rather than enlarge the zones to include a larger percentage of blacks, coupled with the Board's failure to provide evidence (other than convenience for blacks living in the Killian Heights area) in justification of its position, supplies *prima facie* proof of the Board's intent to discriminate. Notwithstanding, the Court recognizes that the Miami Sunset area will shortly experience a (relatively) precipitous increase in population. Accordingly, the Court will stay its hand as to Miami Sunset in reliance upon the Board's demographic prediction that the

school will become segregated when the area becomes segregated. Assuming the correctness of such prediction, the Court will, therefore, place Miami Sunset High School in a separate category, and closely monitor the demographic configuration of the area. This, therefore, will be a test case for the validity of the Board's hypothesis as to such demographic patterns.

ENTERED at Miami, Florida, this 16th day of June, 1978.

/s/ C. CLYDE ATKINS
CHIEF UNITED STATES
DISTRICT JUDGE

cc: Frank A. Howard, Esq.
Dr. Gordon Foster
Elizabeth J. DuFresne, Esq.

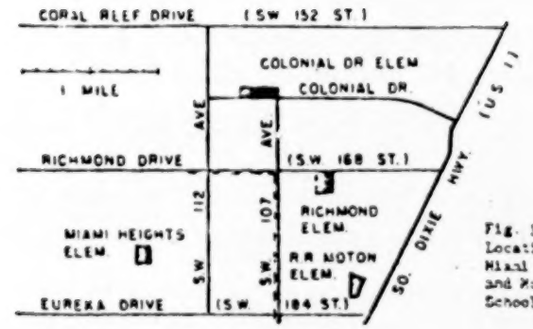

Fig. 1
Location of Colonial Drive, Miami Heights, Richmond and Moton Elementary Schools.

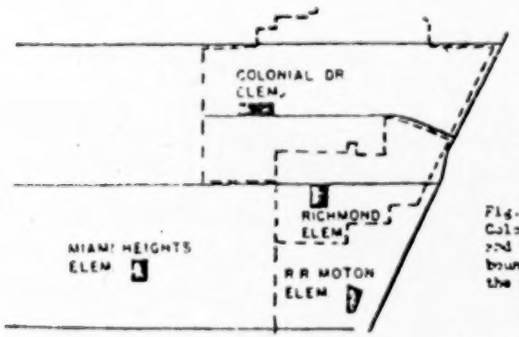

Fig. 2
Colonial Drive, Richmond, and Miami Heights boundaries established by the Court 1969 - 1970.

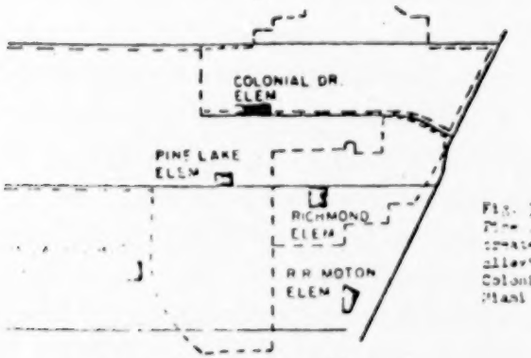

Fig. 3
Pine Lake boundaries created in 1976 to alleviate overcrowding at Colonial Drive and Miami Heights Elementary.

ORDER DENYING MOTION TO INTERVENE, MOTION FOR EMERGENCY HEARING AND MOTION TO STAY

(Number and Title Omitted)

(Filed: August 3, 1978)

THIS CAUSE having come before the Court on motions of Intervenors to permit intervention as defendants in this cause, motion for emergency hearing and motion to stay, and the Court having considered the record in this cause, and being otherwise duly advised, it is

ORDERED AND ADJUDGED that said motions are DENIED.

DONE AND ORDERED at Miami, Florida, this 2nd day of August.

/s/ C. CLYDE ATKINS
UNITED STATES
DISTRICT JUDGE

Copies furnished:
Shaw & Segall
Frank A. Howard, Jr., Esq.
James W. Matthews, Esq.
Irma Robbins Federa, Esq.
Elizabeth J. DuFresne, Esq.

General Counsel, State Board of Education
Dr. Gordon Foster, Chairman, Bi-Tri Committee
(for distribution to all Committee members)
Mr. John Cunning, Chairman, Pine Lake Elementary Advisory Committee
Mr. James E. Vilberg, Chairman, Richmond Elementary Advisory Committee
Ms. Phyllis Miller

MEMORANDUM OPINION

(Number and Title Omitted)

(Filed: August 3, 1978)

On June 16, 1978, in an exercise of its continuing duty to assure the maintenance of a unitary school system in Dade County, Florida, this Court ordered the Dade County School Board, in consultation with the Bi-Racial/Tri-Ethnic Advisory Committee to select a plan to remedy violations arising from the attendance zones for Pine Lake and Richmond Elementary Schools. The Board did not seek to appeal from the Order of June 16, 1978, but instead decided to comply with that Order; and at a public meeting on June 28, 1978, the Board adopted a plan of pairing the two schools under which grades K-3 will attend Pine Lake Elementary School and grades 4-6 will attend Richmond Elementary School.

On June 23, 1978, a group of parents of children residing within the Pine Lakes and Richmond Heights school districts moved to intervene for the purpose of appealing from the Order of June 16, 1978. The Board and the American Civil Liberties Union oppose such intervention. For the reasons set forth below, the Court denies the motion to intervene.

The intervenors assert that they are entitled to intervene for the purpose of freeing the Board from judicial restraint so as to allow it to exercise its discretion to the fullest degree constitutionally permissible, relying on *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). In the recent case of *United States v. Perry County Board of Education*, 567 F.2d 277, 279 (5th Cir. 1978), however, the Fifth Circuit declined to follow the "broad approach to intervention illustrated by the *Smuck* case," noting that

> "[i]n the context of public school desegregation, there are innumerable instances in which children, parents, and teachers may be deprived of various 'rights' (e.g., the 'right' to attend a neighborhood school) without having had the opportunity to participate directly in the judicial proceedings which divest them of those 'rights.' When these adversely affected groups have sought to intervene, we have frequently declined to permit it." [citations omitted]

The criteria applicable to a determination of the right to intervene in desegregation cases is set forth in *Hines v. Rapides Parish School Board*, 479 F.2d 762 (5th Cir. 1973). Under *Hines*, parents seeking to intervene must demonstrate an interest in a desegregated school system. *Perry, supra*. As in *Perry*, nowhere in the motion for intervention or in the memoranda in support thereof do those seeking to intervene contend that the goal of a unitary school system has been frustrated. To the contrary, intervenors contend that a unitary system existed under the attendance zones as previously drawn and, thus, the Court has required more of the Board than is constitutionally required.

Additionally, the case presently before the Court is factually distinguishable from *Smuck*. An important factor in the District of Columbia Circuit's decision to allow intervention in that case was that Congress had recently enacted legislation to provide for the first time for an elected school board in the District of Columbia. *Id.* at 180, n. 18. As a result, the appointed school board which had made the decision not to appeal from the district court's order had been superseded by a new elected Board of Education. In this context, the Court found it imperative that the new board be allowed "the fullest discretion permitted by the Constitution to reshape educational policy within the District." *Id.* at 177. Further, the new board did not oppose the intervention. In contrast, the Dade County School Board which has made the decision not to appeal this Court's Order of June 16, 1978, is the same board which must

comply with the Order for the coming school year, and opposes the attempt to intervene. Thus, this case is virtually identical to *Spangler v. Pasadena City Board of Education*, 427 F.2d 1352 (9th Cir. 1970), in which the Ninth Circuit affirmed the District Court's denial of a motion to intervene by a group of parents dissatisfied with a desegregation decree and the decision of the Board of Education not to appeal.

In *Spangler*, the Court distinguished *Smuck*, and found:

> "In the case before us the decision not to appeal was in effect a decision to acquiesce in the court decree — a decision made by the very board affected by the decree. The decision was made by a board of elected representatives of the residents of the school district, including these appellants. It was made following public hearings at which appellants had full opportunity to influence the board's decision. That decision was within the competence of the board in balancing many competing factors against the relatively modest degree of restraint imposed by the decree.
>
> Pursuant to court decree the board has now adopted a plan for integration of the schools which has been submitted to the court and received court approval. Before us the board opposes appellants in their effort to intervene. It wishes to be free forthwith to put

its plan into operation and argues persuasively that intervention and a prolongation of this suit will cause confusion and turmoil within the school district and be disruptive of their plan.

It is clear that the protectable interest of appellants in the freedom of their school board from excessive judicial interference is substantially less apparent here than it was in *Smuck*. Such restraints as were imposed have in substance been found acceptable by the board and thus create no present prejudice."

Id. at 1354.

The avowed purpose of the parents seeking intervention here is "not to substitute their judgment for that of the elected School Board, but to free the Board from judicial restraint so that it may exercise its discretion, to the fullest degree constitutionally permissible, in deciding educational policies." However, that same board, in the exercise of the same discretion which the intervenors ostensibly seek to preserve, has determined that an appeal is not in the best interests of the school system. Contrary to their protestations, the intervenors do seek to substitute their judgment for that of their elected representatives on the issue of whether compliance with this Court's Order or appeal is the better course. These parents are not entitled to intervene simply because they would have voted differently had they been members of the Board. *Perry, supra.*

Finally, intervenors have moved for a hearing as required by *Calhoun v. Cook*, 487 F.2d 680 (5th Cir. 1973) and *Jones v. Caddo Parish School Board*, 499 F.2d 914 (5th Cir. 1974). In *Hines, supra*, the Fifth Circuit held that the proper course for groups seeking to question deficiencies in the implementation of desegregation orders is to file a petition for intervention that would bring to the attention of the district court "the precise issues which the new group sought to represent and the ways in which the goal of a unitary system had allegedly been frustrated." *Id.* at 765. When presented with such a precise petition, an evidentiary hearing is necessary to enable the court to determine if the criteria in *Hines* are satisfied, in that it must be determined whether the issues sought to be raised were properly represented by the existing parties. *Jones, supra.* The necessity for this procedure arises because "every group must be allowed the opportunity to show the court that the desired and legally required unitary system has not been achieved . . . ." *Hines, supra* at 765.

The motion to intervene filed in this cause is clearly not the precise petition mandated by *Hines, Calhoun*, and *Jones, supra;* and thus, intervenors have failed to meet a threshold requirement entitling them to a hearing. Further, unlike the parents in *Hines,* these intervenors have not placed themselves within the area of jurisdiction retained by this Court, since they do not allege that the goal of a unitary system has been frustrated. When such allegations have been made this Court has not hesitated to hold evidentiary hearings, and, in fact, held a lengthy evidentiary hearing prior to reaching the

decision reflected in the Order of June 16, 1978; however, under the present circumstances, a further evidentiary hearing would not fulfill the role envisioned by the cases cited above and would not aid the Court's determination of the issues presently raised. Therefore, the motion for emergency hearing is also denied.

A separate Order shall be entered in accordance herewith.

ENTERED at Miami, Florida, this 2nd day of August, 1978.

/s/ C. CLYDE ATKINS
CHIEF UNITED STATES
DISTRICT JUDGE

Copies furnished to:

Shaw & Segall
Frank A. Howard, Jr., Esq.
James W. Matthews, Esq.
Irma Robbins Federa, Esq.
Elizabeth J. DuFresne, Esq.
General Counsel, State Board of Education
Dr. Gordon Foster, Chairman, Bi-Tri Committee
(for distribution to all Committee members)
Mr. John Cunning, Chairman, Pine Lake Elementary Advisory Committee
Mr. James E. Vilberg, Chairman, Richmond Elementary Advisory Committee
Ms. Phyllis Miller

Herbert PATE et al.,
Plaintiffs,

versus

DADE COUNTY SCHOOL BOARD, etc., et al.,
Defendants-Appellees,

versus

Ethel BECKFORD et al.,
Movants-Appellants.

Nos. 78-2634, 78-2750.

United States Court of Appeals,
Fifth Circuit.

Jan. 26, 1979.

Rehearing Denied March 1, 1979.

Appeals from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, GEE and VANCE, Circuit Judges.

PER CURIAM:

In the fall of 1977 the Dade County School Board opened the new Pine Lake Elementary School, just four

or five blocks from its existing Richmond Elementary School. The physical characteristics of the two schools generally reflect the differences between the middle and upper class, predominantly white, neighborhood served by Pine Lake and the predominantly black neighborhood served by Richmond. The student body at Pine Lake was eighty percent white and twenty percent black. The student body at Richmond was eighty percent black and twenty percent white.

In compliance with the requirements imposed by this court in *Pate v. Dade County School Board*, 434 F.2d 1151 (5th Cir. 1970), the district court had previously established a bi-racial tri-ethnic committee to monitor the actions of the county school board. At the request of the so-called bi-tri committee the district court issued a show cause order to the county school board on May 4, 1978. The school board was required to justify its decision not to put into effect the recommendations of the bi-tri committee as to attendance zone changes for the 1978-1979 school year. The school board responded by defending its action and argued that the court had no basis for intervention. Following an evidentiary hearing the district court entered an order on June 16, 1978 requiring in the Pine Lake-Richmond situation that the school board adopt one of the alternative plans proposed by the bi-tri committee.

On June 26, 1978, appellants filed a motion to intervene in the district court. Appellants are dissatisfied parents of children in both the Richmond

Heights and Pine Lakes districts. They alleged that their interests were not adequately represented by the existing parties and that they desired to intervene in order to appeal the district court's order. On June 28, 1978, intervenor, American Civil Liberties Union of Florida, filed its opposition to the proposed intervention. On June 30, 1978, the school board filed a response to the June 16, 1978 order. The school board reported that school officials had met with the bi-tri committee, that the school board had adopted the committee's recommendation pairing the two schools in question, had fully complied with the court's order and had determined that no appeal should be taken. The school board stated to the court that there was no longer any case or controversy between the parties and objected to intervention by the present appellants. On August 3, 1978, the district court denied appellants' motion for intervention.

Two separate appeals have been taken. In Case No. 78-2634 the applicants in intervention appealed the district court's order of June 16, 1978. In Case No. 78-2750 applicants appealed the court's subsequent order denying intervention. A motion to consolidate was filed in this court and is hereby granted.

The school board moves to dismiss both appeals on the grounds that the original controversy is moot and that the appellants lack standing to appeal the June 16 order. The school board also urges that the district court correctly denied intervention. Appellants con-

cede that unless they are successful in establishing their right to intervene they have no standing in this court in respect to the June 16, 1978 order.

Appellants cite *Smuck v. Hobson*, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969), to support their contention that they have a right to intervene. They argue that parents of school children have an interest in the litigation and that the failure of the school board to appeal demonstrates that such interest was not being adequately represented. *Smuck*, however, has not been followed in this circuit. In *United States v. Perry County Board of Education*, 567 F.2d 277 (5th Cir. 1978) we specifically declined to do so. Our holdings in the *Perry County* case and in *Hines v. Rapides Parish School Board*, 479 F.2d 762 (5th Cir. 1973) control the present question.

In *Hines* this court explored when and by what means parent groups might present complaints growing out of desegregation litigation. The proper course indicated was a petition for intervention. There was no intimation, however, that such petition was one of right. The court held that: "Certainly every group must be allowed the opportunity to show the court that the desired and legally required unitary school system has not been achieved by an earlier court order." *Id.* at 765. But it also concluded that: "If the court determined that the issues these new plaintiffs sought to present had been previously determined or if it found that the parties in the original action were aware of these issues and completely competent to represent the interests of the new group, it should deny intervention." *Id.* at 765.

The parental interest that justifies permissive intervention is an interest in a desegregated school system. Here, as in the *Perry County* case, "[t]he parents are not seeking to challenge deficiencies in the implementation of desegregation orders . . . ." *United States v. Perry County Board of Education, supra* at 279. They oppose such implementation. Their complaint is that the school board does not also oppose such implementation, but we have held that "Appellants are not entitled to intervention of right simply because they would have voted differently had they been members of these representative bodies." *United States v. Perry County Board of Education, supra* at 280.

Applicants in intervention claim a right to protect the local school board from the district court's exercise of unconstitutional authority. They challenge the lower court's jurisdiction because of its June 30, 1971 finding that Dade County has a unitary system. There has, however, been no relinquishment of the continuing jurisdiction of the district court. In both our original consideration of this case, *Pate v. Dade County School Board, supra*, and in our more recent opinion, *Pate v. Dade County School Board*, 509 F.2d 806 (5th Cir. 1975), we recognized that the district court has a continuing responsibility to appraise the system in the light of actual conditions and experience and make required changes to assure the maintenance of a unitary system. *Lee v. Macon County Board of Education*, 584 F.2d 78 (5th Cir. 1978) makes clear that in the absence of a final judgment or dismissal of the case subject matter jurisdiction is retained over

questions such as the question before the district court in this case. Appellants' contention as to jurisdiction is facially without merit.

Appellees invite to our attention the ninth circuit's opinion in *Spangler v. Pasadena City Board of Education*, 427 F.2d 1352 (9th Cir. 1970) in which the facts are strikingly similar to those before us. The *Spangler* court also rejected application of the *Smuck* decision. It held that the applicants were not entitled to intervene for the purpose of appealing an order which the board of education had decided not to appeal. The ruling in *Spangler* is consonant with the holdings in this circuit and we conclude, as did the court there, that the lower court's ruling is free of error.

The appeal from the order of June 16, 1978 is dismissed. The order of the district court denying intervention is affirmed.

CASE NO. 78-2634 APPEAL DISMISSED.

CASE NO. 78-2750 AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 78-2634 & 78-2750

HERBERT PATE, ET. AL.,
Plaintiffs,

versus

DADE COUNTY SCHOOL BOARD, ETC., ET AL.,
Defendants-Appellees,

versus

ETHEL BECKFORD, ET. AL.,
Movants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

(March 1, 1979)

Before BROWN, Chief Judge, GEE and VANCE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:
/s/ ROBERT D. VANCE
United States Circuit Judge

[Filed: Mar. 1, 1979]

in the

Supreme Court

of the

United States

OCTOBER TERM, 1978

NO. 78-1773

ETHEL BECKFORD, CYNTHIA LAWRENCE, HENRY LAWRENCE, DEVITA BRUTON, WILLY CLYDE STROUD, JOHNNY FLETCHER, GERALDINE FLETCHER, LEE BOHLER, SARA LAWRENCE, LEE ARTHER LAWRENCE, ANNIE MAY LABORN, MADELYN SCHERE, LESLIE ALAN SCHERE, JOHN CUNNING, CAROL CUNNING, THOMAS RUSSELL, LAURIE RUSSELL, DOUGLAS KNOWLES, EDYTH KNOWLES, WAYNE LOUGH and PATRICIA LOUGH,

Petitioners,

vs.

DADE COUNTY SCHOOL BOARD

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARGUMENT

REASONS FOR DENYING THE WRIT

1. Introduction

The public school system of Dade County, Florida, the fifth largest in the nation, was desegregated as the result of judicial proceedings in 1969-1970, and held to be unitary in *Pate v. Dade County School Board*, 434 F.2d 1151 (5th Cir. 1970), *cert. denied* 402 U.S. 953, 91 S.Ct. 1613, 29 L.Ed.2d 123 (1971). In its opinion, the Fifth Circuit concluded by placing the School Board and the district court under the continuing duty to appraise the system and to make changes as might be required to assure the maintenance of a unitary system.

Unlike many other local school systems subject to desegregation mandates, the Dade County School Board has in the ensuing years demonstrated its commitment to the unitary system and its compliance with constitutional requirements. In doing so, it has voluntarily acted to improve the system, and survived challenge by disaffected parents claiming the Board went too far in the direction of desegregation. *See Darville v. Dade County School Board*, 497 F.2d 1002 (5th Cir. 1974). On the other hand, the Board has also twice successfully resisted attack from complainants at the other end of the political spectrum, who sought to contest the unitary status of the school system. *See Pate v. Dade County School Board*, 509 F.2d 806 (5th Cir. 1975).

The common thread to this history, which recurs in the present case, is the firm desire of the School Board to follow the law, but in doing so to make its own decisions

and exercise its own governance in the best interests of the school system, without bowing to extraneous pressures by groups with special interests. The present dispute, arising out of a Board decision to pair only two elementary schools, is another example of an attempt by a parent group to transform a policy disagreement into a justiciable issue.

Underlying all the rhetoric presented by the parents concerning their desire to "free the School Board from judicial restraint so that it may exercise its discretion" are two simple realities which belie their arguments. In the first place, it is obvious that this parent group is simply registering dissatisfaction and disagreement with the School Board's discretionary decision to comply with the district court's order requiring attendance adjustments for the two elementary schools. If the parents were the School Board, they would have decided to appeal that order. The Board, however, is elected by the citizens of all of Dade County, and has the responsibility, which it exercised in this case, to look beyond the self-interests of these parents, no matter how intense or well-meaning their convictions.

Secondly, it is clear that the decision of the School Board to pair the two schools was an exercise of the very discretion which the parent group perceives as being impaired. In reality, therefore, what is in issue here is the School Board's authority to take voluntary action in the direction of further desegregation within its unitary system. Since the decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), it has been undisputed that school boards have full power to determine student attendance patterns in furtherance of desegregation —

even to the point of prescribing racial ratios in schools — and nowhere in the petition is this contested.

In the present case, concededly, the Board took its action pairing Pine Lake and Richmond Elementary Schools in compliance with the district court's order. The conclusive point however, is that in this instance, as in *Darville, supra*, the Board voluntarily acted, in its discretion, to adopt student assignments calculated to improve the quality of desegregation within the school system. If the Board could have done so in the first instance in the exercise of its broad discretionary power, surely the Board has no less power to do so in voluntary compliance with an order of the district court.

This simple issue, it seems to us, is the axis of the present controversy, and demonstrates the insubstantiality of the petitioners' position.

2. Argument to Point I

THE DECISION BELOW, ON THE FACTS OF THIS CASE, PRESENTS NO DECISIONAL CONFLICT WITH OTHER COURTS OF APPEAL.

The issue here is a narrow one, despite petitioners' attempts to inflate it. In the district court, the proceedings involved only the propriety of the student attendance zone established by the School Board for a new elementary school, Pine Lake Elementary, in relation to the existing zone for an older nearby school, Richmond Elementary. The Board defended its actions, but after an adverse ruling decided to comply rather than appeal, and simply paired the two schools. Only then did the present petitioners seek to intervene, for the purpose of taking an appeal in the place of the Board. The issue tried to the district judge was a small one, the remedy prescribed by the judge was limited to the two schools, and the Board in its decision to comply was and is unaware of any judicial interference with its educational policies and goals for the children in the two schools. Accordingly, the Board objected to the late attempt at intervention by the dissatisfied parent group, which was denied by the district court and by the Court of Appeals.

Petitioners' prime reliance, in their attempt to show a conflict warranting review by this Court, is upon *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). It is true enough that the Fifth Circuit, in its decision below, declined to follow the *Smuck* case. It does not, however, follow that the decision below *conflicts* with *Smuck*,

which dealt with a singular and much different factual context. When the circumstances of the two cases are contrasted, the decisions are not inconsistent, and the ruling of the Fifth Circuit would have been the same even if it had followed the approach taken by the *Smuck* court.

A careful reading of the *Smuck* decision clearly reveals this. In the first place, the court there affirmed the trial judge's action *permitting* intervention for appeal purposes, and observed that even under Rule 24(a), his decision to permit intervention "of right" involved an exercise of discretion. *Smuck*, *supra*, at p. 178. Strictly read, then, the Court of Appeals in its decision simply held that the trial judge had not abused his discretion in allowing intervention, under the particular circumstances of that case.

When we examine those unusual circumstances, the bases for the decision appear, and the wide differences from the present case become clear. The decree entered by the trial court found a variety of constitutional violations of system-wide import in the District of Columbia school system, and required remedial plans and actions on a broad scale. The Court of Appeals noted that the appointed Board of Education which had decided not to appeal the decree had been superseded by a newly-elected Board, which had not had a choice on the appeal question, and which the Court observed should have the fullest discretion possible to reshape educational policy within the District. The new Board did not oppose intervention by the parents, which was thus allowed in order to permit them to appeal "those provisions of the decree which curtail the freedom of the school board to exercise its discretion in deciding upon educational policy."

In contrast, of course, the same Dade County School Board which participated in the litigation here then determined not to appeal the district court's order but to comply with it, and the same Board then implemented the pairing of the two schools.

On further examination of the *Smuck* decision, we see that the intervening parents were limited by the Court in the scope of their intervention, since ". . . their interest extends only to those parts of the order which can fairly be said to impose restraints upon the Board of Education." *Smuck*, *supra* at p. 182. The Court made quite clear that not every order of the trial court was "restraint" which the parents-intervenors could contest, but only such portions of the decree which limited the Board's discretion to pursue *educational goals*. Indeed, the Court held that the district court's rulings requiring a long-range pupil assignment plan, and abolishing a "track system" of pupil grouping, did *not* limit the Board's discretion educationally, and that the parents therefore lacked standing to challenge the bases for these rulings. *Smuck*, *supra*, pp. 186-190.

In contrast again, the district judge in the present case only required an adjustment of zones with respect to two elementary schools. This can hardly be seen as any significant "restraint" upon the School Board, and it has no effect whatever on the Board's discretion to pursue educational goals and policies.

The *Smuck* decision, therefore, is much narrower than petitioners suggest, and does not by any means present a conflict with the Fifth Circuit's ruling on the facts of this case.

The other decisions cited by petitioners in their attempt to show a conflict among the circuits may be dealt with quickly. With one exception discussed below, none of the cases decided by Courts of Appeal were concerned with the present issue — intervention to gain standing to appeal. *Atkins v. State Board of Education*, 418 F.2d 874 (4th Cir. 1969) does not cite *Smuck* at all, and approves intervention by parents seeking to desegregate a school system, rather than to complain of an order promoting desegregation. *Liddell v. Caldwell*, 546 F.2d 768 (8th Cir. 1976) cites *Smuck* for the proposition that parents have standing to challenge a *segregated* school system, and approves intervention by black pupils in the trial court for the purpose of challenging the sufficiency of a desegregation decree. *United States v. Board of School Commissioners*, 466 F.2d 573 (7th Cir. 1972) cited *Smuck* only for the general statement that students and parents have an interest in a sound educational system, and *denied* intervention of right to a citizen-parent group, while allowing the trial court, on remand, to consider permissive intervention by the same group in light of newly-raised issues of city-suburban school district consolidation. *Adams v. Mathews*, 536 F.2d 417 (D.C. Cir. 1976), had nothing to do with school law, and approved intervention, without objection by any party, solely to cure a mixup between two lower courts. *Johnson v. San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974) merely allowed intervention in a desegregation case by Chinese parents who represented a distinct ethnic viewpoint.

The one case cited by petitioners which approved intervention for appellate purposes was a Title VII action, in which a putative class member was allowed to intervene in order to appeal a denial of class certification, where the original plaintiffs who purported to represent the class had declined to appeal. *See Romasanta v. United Airlines, Inc.*, 537 F.2d 915 (7th Cir. 1976). The case had nothing to do with school boards or desegregation, and cited *Smuck* only in passing, as did the Supreme Court in its affirmance of the ruling in *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977).

In sum, the petitioners have failed to demonstrate any significant conflict on a substantial point of law, such as to warrant review and resolution by this Court. The alleged conflict with the *Smuck* decision dissolves when analyzed because the special circumstances on which the *Smuck* court based its decision to permit intervention simply do not exist in this case.

This distinction was clearly observed in *Spangler v. Pasadena City Board of Education*, 427 F.2d 1352 (9th Cir. 1970), in which the Ninth Circuit decided the precise issue involved here. In affirming the district court's ruling denying leave to intervene to a parent group which sought to appeal from a desegregation decree, the Court said:

> In the case before us the decision not to appeal was in effect a decision to acquiesce in the court decree - a decision made by the very board affected by the decree. The decision was made by a board of elected representatives of the residents of the school district, including these applicants. It was made following public hearings at which appellants had full opportunity to influence the board's decision. That decision was within the competence of the

board in balancing many competing factors against the relatively modest degree of restraint imposed by the decree.

* * * * *

It is clear that the protectable interest of appellants in the freedom of their school board from excessive judicial interference is substantially less apparent here than it was in Smuck. Such restraints as were imposed have in substance been found acceptable by the Board and thus create no present prejudice.

Spangler, supra at 1354.

3. Argument to Point II

PETITIONERS' CHALLENGES TO THE MERITS OF THE DISTRICT COURT'S ORDER OF JUNE 16, 1978 HAVE NOT BEEN CONSIDERED BY THAT COURT OR THE COURT OF APPEALS, AND SHOULD NOT BE INITIALLY DECIDED BY THE SUPREME COURT.

In their argument on this Point, petitioners seek to have the Court reach and review the merits of the contentions petitioners *would* have submitted to the Court of Appeals, if their intervention had been granted. These issues, however, have never been considered by the district court at all, and although argued by petitioners in their brief to the Fifth Circuit, that court also very clearly did not pass on petitioners' contentions. As the Fifth Circuit observed in its opinion, the appellants (petitioners here) conceded that unless they were successful in establishing their right to intervene, they had no standing to appeal in respect to the district court's order of June 16, 1978, which the School Board had declined to appeal (Appendix to petition, pp. 19a-20a). The Court of Appeals thus *dismissed* the appeal taken by petitioners from that order.

In this posture of the case, we frankly do not feel called upon to argue these issues. We simply suggest that it would be highly inappropriate, and a departure from settled practice, for the Court at this point to decide issues which have been passed over by the courts below, and as to which the Court does not have the benefit of prior appellate scrutiny and deliberation. See Wright, Miller & Cooper, *Federal Practice and*

Procedure, vol. 17, sec. 4036 (1978); and cases cited in footnote 65 to that text.

While we believe that the Court should not review this case at all, we submit that if certiorari is granted, the writ should be limited to the question of the petitioners' right to intervene in order to pursue their appeal. Their substantive contentions should be considered only if the Court then rules favorably on their right to intervene, and these contentions should properly be remanded for prior consideration by the district court and the Court of Appeals.

CONCLUSION

The parents-appellants cast themselves in the role of defenders of the School Board's discretion, and see the Board as needing protection from the federal courts.

The School Board feels no present need for protection from the judiciary. It rather asks the Court for protection against the attempted usurpation of its decision-making authority by the parental group.

The petitioners have failed to show any significant decisional conflict among the circuits and their plea for intervention is patently nothing more than a policy disagreement with the School Board over a minor student assignment change.

The petition should be denied.

Respectfully submitted,

FRANK A. HOWARD, JR.
Attorney for Respondent
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Miami, Florida 33132

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon all parties required to be served, service having been effected by mail, in accordance with paragraph 1 of Rule 33 of the Rules of the Supreme Court of the United States, to the following named attorney of record, on the_____day of July, 1979.

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